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ATTORNEYS FOR APPELLEE:

STEVE CARTER
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**IN THE
COURT OF APPEALS OF INDIANA**

[illegible]

No. 92A03-0803-PC-104

)

August 29, 2008

BAKER, Chief Judge

Appellant-petitioner James E. Wilhelm appeals the trial court's denial of his petition to modify his sentence. Specifically, Wilhelm claims that Indiana Code section 35-38-1-17(b) is unconstitutional because it violates Article III, section 1 of the Indiana Constitution. In addition, Wilhelm argues that the prosecutor violated the terms of an "Open" plea agreement when he objected to the request for modification.¹ Finding that Wilhelm has waived these arguments, we affirm the judgment of the trial court.

FACTS

On December 16, 1994, Wilhelm filed a motion to withdraw his guilty plea and pleaded guilty to burglary, a class A felony; robbery, a class A felony; criminal confinement, a class B felony, and to being a habitual offender. The motion stated that there was "NO PLEA AGREEMENT." Appellant's App. p. 41 (emphasis in original). Wilhelm was sentenced to concurrent terms of forty-five years for burglary, twenty years for robbery, and ten years for criminal confinement. The trial court also enhanced the burglary conviction by twenty-five years in light of the habitual offender count. Thus, Wilhelm was sentenced to an aggregate term of seventy years of incarceration.

Since being sentenced, Wilhelm has filed nine petitions for sentence modification. All were denied based on lack of consent from the prosecutor as required by Indiana Code section 35-38-1-17(b). The most recent petition was filed on January 17, 2008, wherein Wilhelm argued that his sentence should be modified because of his educational

¹ As an aside, we note that Wilhelm also argues that his motion to reconsider the trial court's denial of his petition for sentence modification should be treated as motion for relief from judgment under Trial Rule 60(B)(1). This argument, however, was made for the first time in Wilhelm's reply brief, and Indiana Appellate Rule 46(C) provides that "[n]o new issues shall be raised in the reply brief." Therefore, we will not consider this issue.

accomplishments, good behavior while incarcerated, nonuse of alcohol and drugs, and remorse for his actions. The trial court denied that petition on January 30, 2008.

On February 11, 2008, Wilhelm filed a notice of appeal, and on February 15, 2008, he filed a motion requesting that the trial court reconsider the denial of his request for sentence modification. Wilhelm argued for the first time in his motion to reconsider that Indiana Code section 35-38-1-17(b) is unconstitutional and that the State violated his “Open” plea agreement when the prosecutor refused to consent to the sentence modification. Appellant’s App. p. 35. In addition, Wilhelm asserted that he had filed a notice to withdraw the notice of appeal; however, the record does not indicate that any such motion was ever filed. Wilhelm now appeals the denial of his petition for sentence modification.

DISCUSSION AND DECISION

I. Waiver of Constitutional Challenge

Wilhelm first contends that Indiana Code section 35-38-1-17(b), which gives the prosecuting attorney the power to veto a defendant’s request for sentence modification if more than 365 days have elapsed since sentencing, is an unconstitutional violation of separation of powers under the Indiana Constitution. Generally, a constitutional question must be properly raised at the trial court level before it will be considered on appeal. Ruge v. Kovach, 467 N.E.2d 673, 675 (Ind. 1984). Furthermore, waiver cannot be avoided by raising a constitutional question for the first time in a motion for reconsideration filed after final judgment because “motions to reconsider are properly

made and ruled upon prior to the entry of final judgment.” Hubbard v. Hubbard, 690 N.E.2d 1219, 1221 (Ind. Ct. App. 1998).

Here, Wilhelm did not challenge the constitutionality of Indiana Code section 35-38-1-17(b) until he filed the motion for reconsideration. Moreover, Wilhelm had already filed his notice of appeal prior to filing the motion to reconsider. Thus, because Wilhelm did not challenge the constitutionality of the statute in a timely fashion, the issue is waived. Id.

We acknowledge that a motion to correct error can be made after the entry of final judgment. Id. However, even if we construe Wilhelm’s motion as a motion to correct error, his claim is still not preserved because “[a] party may not raise an issue for the first time either in a motion to correct errors or on appeal.” Mitchell v. Stevenson, 677 N.E.2d 551, 561 (Ind. Ct. App. 1997).

Finally, waiver notwithstanding, we note briefly that this Court has previously upheld the constitutionality of Indiana Code section 35-38-1-17(b). See Reed v. State, 796 N.E.2d 771, 774 (Ind. Ct. App. 2003) (rejecting defendant’s argument that requiring the State’s consent for sentence modifications violates separation of powers); see also Beanblossom v. State, 637 N.E.2d 1345, 1347-48 (Ind. Ct. App. 1994) (holding that Indiana Code section 35-38-1-17(b) does not violate the separation of powers doctrine because trial courts do not have inherent authority to modify a sentence).

Although Wilhelm argues that our Supreme Court’s decision in Stephens v. State, 818 N.E.2d 936 (Ind. 2004), should necessarily change this Court’s analysis regarding the constitutionality of the statute, the Stephens court pointed out that the trial court retains

some statutorily authorized jurisdiction over suspended sentences, not executed sentences. 818 N.E.2d at 940-41. Here, because Wilhelm is seeking modification of an executed sentence, Stephens is inapposite and his claim fails.

II. Waiver of Open Plea Agreement

In a related argument, Wilhelm maintains that he is entitled to reversal because the prosecutor violated the terms of his “Open” plea agreement by exercising the statutory right of approval over sentence modifications. Appellant’s App. p. 35. Again, Wilhelm has waived this argument because he failed to raise it until his motion to reconsider, which he filed after he had already filed his notice of appeal. Even more compelling, Wilhelm’s motion to withdraw his not guilty plea and enter a guilty plea specifically stated that there was “NO PLEA AGREEMENT.” Appellant’s App. p. 41 (emphasis in original). Therefore, there was no “Open” plea agreement to violate and Wilhelm’s claim fails.

The judgment of the trial court is affirmed.

MATHIAS, J., and BROWN, J., concur.